UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

In the Matter of:

NICHOLSON TERMINAL & DOCK COMPANY, Case 07-CA-187907

Respondent,

-and-

STEVE LAVENDER, an Individual,

Charging Party.
_____/

SUPPLEMENTAL BRIEF OF NICHOLSON TERMINAL AND DOCK

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION/PROCEDURAL POSTURE OF THE CASE

General Counsel filed a Charge against Respondent Nicholson Terminal and Dock ("Nicholson") for the "mere maintenance" of certain common-sense rules in its employee handbook. On January 4, 2018, after the hearing was closed and the parties had submitted post-hearing briefs, the ALJ allowed the parties to submit supplemental briefs, in light of the Board's ruling in Boeing Company, 365 NLRB No. 154 (2017), which overruled Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004). Neither party requested to re-open the hearing.

During its Opening Statement at the hearing, General Counsel withdrew the portion of the Charge that had challenged the handbook's requirements regarding posting notices, Paragraph 17. After the issuance of Boeing Company, supra, General Counsel withdrew its challenge to: (1) Rule #26 (maintaining confidential information); (2) Rule III(L) (employees must maintain confidential company or vendor information); and Rule III (N): employees must wear appropriate attire at work.

Therefore, the only remaining rules that are still in dispute are:

> #16: the prohibition against illegal slowdown, strikes or walkouts;
>
> III (Q): employees must use Nicholson's computers and website only for business-related purposes;
>
> III (V): employees must meet minimal restrictions before working in a moonlighting job; and
>
> III (X) and Attachment A: employees may not use a camera or cell phone while at work.

In light of the new standards under Boeing, these rules were instituted for legitimate business reasons and their application has not had any significant adverse impact on employees' Section 7 rights. Therefore, the Charge against these remaining rules should be dismissed.

STATEMENT OF FACTS

Respondent relies on the Statement of Facts described in its Post-Hearing Brief.

ARGUMENT

A. UNDER THE NEW STANDARD FOR EVALUATING FACIALLY NEUTRAL WORK RULES, GENERAL COUNSEL FAILED TO MEET HER BURDEN OF PROOF THAT THE HANDBOOK VIOLATES THE ACT.

General Counsel brought its challenge to Respondent's work rules under the third prong under Lutheran Heritage-Livonia, 343 NLRB 646 (2004), whether a reasonable employee could interpret them to interfere with the exercise of his or her Section 7 rights. Id. at 646. Boeing Company expressly overruled the "reasonably construe" standard of Lutheran Heritage-Livonia. Id., slip op. at pp. 2, 5. Therefore, all prior precedent under Lutheran Heritage-Livonia is irrelevant and must be ignored.

In Boeing Company, the Board established a new standard for evaluating whether facially neutral policies violate the NLRA:

> [T]he Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule. We emphasize that *the Board* will conduct this evaluation, consistent with the Board's 'duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy, focusing on the perspective of employees, which is consistent with Section 8(a)(1). . . .
>
> Accordingly, we find that the Board must replace the *Lutheran Heritage* test with an analysis that will ensure a meaningful balancing of employee rights and employer interests.

Id., slip op. at pp. 3-4.

The Board amplified this balancing test:

> In all cases, the Board will consider whether a facially neutral rule, when reasonably interpreted, has a potential adverse impact on the exercise of NLRA-protected rights. If so, the Board will then consider the justifications associated with the challenged rule to determine whether maintenance of the rule violates the Act.

Id., slip op. at p. 14.[1]

This new legal standard is to be applied retroactively to pending cases. Id., slip op. at p. 11.

Under the proposed "balancing test," each of Nicholson's rules are lawful under the Act. A key factor in applying this new standard is whether any employee was disciplined or suffered a monetary loss due to the application of the work rule. Id., slip op. at p. 3. Although the remedy sought in the Charge requests that employees be made whole for any monetary loss, General Counsel presented no evidence during the hearing that any employee suffered any monetary loss or was disciplined as a result of these work rules (Tr. 39-40, 50, 63-65). The undisputed testimony of Mr. Sutka, Respondent's Treasurer and manager of labor relations, and Mr. Van Els, the IAM staff representative, confirms that conclusion (Tr. 20, 39-40, 50, 57-58, 63-65).

General Counsel may argue that Mr. Sutka did not explain the employer's rationale for these rules when he distributed the handbook to employees. Nothing in Boeing, supra, requires the employer to explain why it has promulgated work rules. To explain why each rule in a 21-page, single spaced handbook exists is impractical. Further, since the handbook was negotiated into the collective bargaining agreement, the IAM had full opportunity to question, at the bargaining table, the rationale for any given rule.

[1] The Board delineated three categories of work rules under its balancing test, however, it stated those categories could be the result of the balancing analysis, not part of the analysis itself. Boeing, supra, p. 3, p. 50, fn 17. The rules at issue in the instant case should be categorized as either category 1 (lawful, with no adverse impact on Section 7 rights, or minimal adverse impact which are outweighed by the employer's business justifications) or category 2 (individualized scrutiny of the rules to determine if there is an adverse impact, and if so, would that impact be overweighed by the employer's business reasons).

(A) Moonlighting

Mr. Sutka's testimony was undisputed that no IAM-represented employee is working in a second job or that any employee asked to work in a second job (Tr. 46). His testimony is also undisputed that no employee, union or non-union, has been denied by management to work in a second job (Tr. 46).

Mr. Sutka explained the reason for the rule regarding moonlighting:

> Q. What's the reason for having the rule about moonlighting?
>
> A. We need our employees sharp and available. We are a volume driven, seasonal business. And we would like to know if somebody has a job that might not be compatible with a full-time role at Nicholson Terminal.
>
> Q. What would not be compatible?
>
> A. Well, working for another customer would be one of them. Maybe working a late night shift as a security guard would be another.
>
> Q. Why?
>
> A. That would bring up <u>fatigue during their regular working</u> hours.
>
> Q. If an employee has to do some union organizing for IAM or someone else off site, would that be a basis on this rule to deny it?
>
> A. No.
>
> * * *
>
> Q. BY MR. SCHWARTZ: So the rules talks about jobs that are inconsistent with the Company's interest, so what would be the types of jobs that would be inconsistent with the Company's interest?
>
> A. Well, <u>working for another customer</u> is one. If they took a part-time job with say the Port of Toledo, we wouldn't want -- we'd be <u>uncomfortable with that because they're a competitor</u>. Or the example I provided, working as a nighttime security guard where their hours could potentially lead to fatigue on the job.

> Q. Why would fatigue on the job be a problem?
>
> A. Because we work in a dangerous environment where there's a lot of moving parts, and people need to be aware of their surroundings to be safe.
>
> Q. So the cargo, type of cargo that's typically loaded and unloaded, how much would it weigh, what type of range?
>
> A. 20-, 50-, 65,000 pounds, some heavier. We've had cargo that moves over 100,000 pounds. Very heavy things.

(Tr. 46-47) (emphasis added).

Mr. Sutka delineated, without rebuttal, legitimate reasons for the moonlighting work rule: preventing fatigue in the interest of workplace safety and preventing an employee from working for a competitor. Neither has any impact on an employee's Section 7 rights.

The Board's only conceivable objection to Nicholson's rule regarding secondary employment is that it might possibly interfere with an employee working part-time for the IAM. See, e.g., Thermal Tech, 2012 WL 6085161 (N.L.R.B.G.C.) (May 16, 2012) (analysis applied under Lutheran Heritage-Livonia "reasonably construed" standard). Since the employees have had a collective bargaining representative for nearly six decades, there is no likelihood of any union planting a "salt" in the workforce for the purpose of union organizing. Mr. Sutka testified, without rebuttal, that he would not object if any employee wanted to work part-time for the IAM, provided that the hours would not interfere with his or her productivity during the regular shift (Tr. 47). The collective bargaining agreement expressly provides for such a possibility (R. Ex. 1, p. 16) (emphasis added):

> The Company agrees to grant necessary and reasonable time off, without discrimination or loss of seniority rights and without pay, to any seniority employee designated by the Union to attend a Labor Convention or serve in any capacity on other official Union business, provided one week written notice is given to the Company by the Union specifying length of time off. The Union agrees that,

> in making its request for time off for Union activities, due consideration shall be given to the number of employees affected in order that there shall be no disruption on the Company's operations due to lack of available employees. Not more than one (1) employee shall be on leave at any one time. The maximum amount of any leave is two (2) years.

No evidence was presented that the moonlighting rule was established to prevent salting or was discriminately enforced. To the contrary, the application of the rule has never come up.

Under the new standard, the moonlighting rule does not violate the Act.

(B) Computer Equipment

The Board apparently challenges Nicholson's rules regarding use of electronic equipment under the theory that it might impede employees' ability to communicate with one another about work-related issues. However, given the fact that such electronic equipment is not provided by the employer to outside (non-office) staff and they do not have access to the office electronic equipment, such a challenge is baseless and has no impact on their Section 7 rights (Tr. 40-41). These outside employees do not have access to the Company's website or Company email addresses (Tr. 41). For inside (office) staff, the Company has legitimate reasons for its work rules—the equipment is to be used solely for work-related purposes to maximize productivity. Mr. Sutka testified:

> Q. Why do you have a rule, the rule relating to the use of computers relating to those employees, inside employees?
>
> A. So that appropriate use of the company equipment is taking place, productivity. We want them doing work on the computer that's necessary business.
>
> Q. Are they allowed to do their own personal business during company time?
>
> A. Not necessarily, no. No.
>
> Q. Do the office employees that are non-management, do they have smartphones provided by Nicholson?

A. Do not.

Q. Do they have any cell phones provided by Nicholson?

A. Do not.

Q. Do they have email addresses provided by Nicholson?

A. Yes.

Q. Under the handbook, what are they allowed to use those email addresses for?

A. For business communication with customers, vendors, fellow employees, business purposes.

Q. Under the handbook, can they use the Nicholson email addresses for personal business?

A. No.

Q. Why not?

A. We like to utilize that for business purposes alone, for productivity sake and proper business use.

(Tr. 41-44).

Nicholson does not provide IAM-represented employees with computers (Tr. 40-41). It does not provide any Union employee with either an email address or a smart phone (Tr. 40-41). Therefore, there is no company-provided electronic equipment for them to discuss work-related concerns; thus, this rule has no practical effect on them.

Logic dictates that a rule that electronic equipment (computers, email addresses, smart phones) be used solely by inside (office) employees for work productivity is a legitimate business justification. Such a rule has no impact on these employees' Section 7 rights. The rule does not prohibit them from using their personal computers, smart phones and email addresses from communicating with each other during non-working periods. The rule also does not prohibit them

from discussing work-related concerns on their own private computers, smart phones or email addresses. Nicholson would have no access to monitor those devices, therefore, there is no impediment to any employee using his or her own personal equipment to communicate with one another about work-related matters. Under Michigan's Internet Privacy Act, the company cannot monitor employees' communication through their personal cell phones or email addresses:

> An employer shall not do any of the following:
>
> (a) Request an employee or an applicant for employment to grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal internet account.
>
> (b) Discharge, discipline, fail to hire, or otherwise penalize an employee or applicant for employment for failure to grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal internet account.

MCL 37.273.

General Counsel may argue that the work rules provide that the company may monitor employees' messages through the email addresses and computers provided by the company. Such monitoring is expressly authorized by Michigan law, the Internet Privacy Act, MCL 37.271, et seq. Section 5(1) of that Act states (emphasis added):

> (1) This act does not prohibit an employer from doing any of the following:
>
> (a) Requesting or requiring an employee to disclose access information to the employer to gain access to or operate any of the following:
>
> (i) An electronic communications device paid for in whole or in part by the employer.
>
> (ii) An account or service provided by the employer, obtained by virtue of the employee's employment relationship with the employer, or used for the employer's business purposes.
>
> (b) Disciplining or discharging an employee for transferring the employer's proprietary or confidential information or

> financial data to an employee's personal internet account without the employer's authorization.
> (c) Conducting an investigation or requiring an employee to cooperate in an investigation in any of the following circumstances:
>
> (i) If there is specific information about activity on the employee's personal internet account, for the purpose of ensuring compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct.
>
> (ii) If the employer has specific information about an unauthorized transfer of the employer's proprietary information, confidential information, or financial data to an employee's personal internet account.
>
> (d) Restricting or prohibiting an employee's access to certain websites while using an electronic communications device paid for in whole or in part by the employer or while using an employer's network or resources, in accordance with state and federal law.
> (e) Monitoring, reviewing, or accessing electronic data stored on an electronic communications device paid for in whole or in part by the employer, or traveling through or stored on an employer's network, in accordance with state and federal law.

MCL 37.275 (emphasis added).

Mr. Sutka's unrebutted testimony is that office employees should use electronic equipment only for work-related purposes (Tr. 40-41). The rule does not chill the outside or inside employees' Section 7 rights, since they can freely communicate using their personal email addresses and electronic devices. Therefore, under the Boeing standard, it is lawful.

(C) Cameras

In its Charge, General Counsel challenges Nicholson's prohibition on cameras and video recorders at work. The employer's "no camera" rule was the only work rule specifically evaluated in Boeing, supra. In Boeing, the Board determined the "no camera" rule was lawful, citing five business justifications given by the employer: (1) security concerns, as a federal contractor; (2) prevention of disclosure to unauthorized persons about technical issues, in order to meet its federal

mandated duty; (3) prevention of disclosure of its manufacturing methods and processes; (4) prevention of personally identifiable information; and (5) concerns about a terrorist attack. Boeing, supra, slip op. at pp. 4-5, 12-13. The Board held that an adverse impact on employees' Section 7 was slight, thus, under the balancing test, the employer's business justifications outweighed that slight impact on employees' Section 7 rights.

Where a no camera rule has only a slight impact on employee rights, an employer's legitimate business reasons will outweigh that slight impact. Boeing, supra, slip op. at p. 60, fn 89 (reaffirming the Board's holding in Flagstaff Medical Center, 357 NLRB 659 (2011)). Mr. Sutka delineated the reasons for the rule, which are similar to the employer's rationale in Boeing:

> Q. There is a rule in the handbook, Joint Exhibit 1, prohibiting cameras and video. Why is that rule?
>
> A. For safety purposes.
>
> Q. What do you mean?
>
> A. We don't want our employees that are out in the field in that environment being distracted while using those types of devices.
>
> Q. Who has access to the two sites at Ecorse and Detroit? Who can come in?
>
> A. Well, our employees because they've been screened. And anybody who else has a business purpose there has to go through a screening process.
>
> Q. Can the public go in?
>
> A. No.
>
> Q. Are you familiar with TWIC?
>
> A. Yes.
>
> Q. What is TWIC?
>
> A. Transportation Worker Identification Credential.

Q. What is that?

A. It's a credential that has been mandated by the Department of Homeland Security for people who work in the transportation industry. It applies to our business. All of our employees have an active -- are required to have an active TWIC.

Q. The employees that work inside, do they interact with customers?

A. Yes.

Q. Do the outside employees interact with customers or vendors?

A. Yes.

Q. Do the inside employees interact with government officials, say from Homeland Security or OSHA?

A. Yes.

Q. How about the outside employees, do they --

A. Yes.

(Tr. 48-49) (emphasis added).

In the instant case, Nicholson is subject to strict OSHA and Homeland Security regulations (Tr. 48-49). The rules prohibiting cameras were introduced for safety reasons, given the potentially dangerous conditions they work in and to meet security concerns (Tr. 47-49).

Diminishing any adverse impact on their Section 7 rights, Nicholson employees have an alternative to using cameras to take pictures to raise safety concerns. The collective bargaining agreement establishes a safety committee to discuss employees' concerns about safety and potential safety hazards (R. Ex. 1, p. 18). Nothing prohibits employees from making handwritten notes about safety or other work-related concerns during employee meetings or during non-working time. The rule also allows employees to use cell phones in non-working areas, during non-working time, such as breaks (Jt. Ex. 1, p. 18).

As Mr. Sutka testified, equipment operators move tons of cargo (Tr. 25, 47). Without their full attention to these dangerous operations, employees are at risk of being crushed by this cargo. They cannot be subject to "distracted driving" while operating this equipment. For the same reason, the rule prohibits portable radios and headphones (Jt. Ex. 1, p. 18). The employer's safety and security concerns far outweigh any slight impact on employees' Section 7 rights.

(D) Illegal Slowdowns, Strikes and Walkouts

The collective bargaining agreement reflects the IAM's quid pro quo bargain with Nicholson—the Union will not strike and the Company will not lock out (R. Ex. 1, pp. 25-26). Mr. Sutka explained:

> Q. Respondent's Exhibit 1, I believe, is the current contract. Does that have language about strikes and lockouts?
>
> A. Yes.
>
> Q. Can employees strike without union approval under the contract?
>
> A. I don't believe so, no.
>
> Q. Joint 1 has a rule against illegal strikes, walkouts, and slowdowns. What's the purpose of that rule?
>
> A. It's a reiteration of what's in the collective bargaining agreement.

(Tr. 39-40) (emphasis added).

The handbook reiterates this collectively bargained rule (Tr. 39). No employee has been docked pay or disciplined under this rule (Tr. 39-40).

Since under the collective bargaining agreement an employee cannot participate in a strike, sympathy strike or walkout slowdown—legal or illegal, employees cannot participate in an illegal strike, sympathy strike, slowdown, walkout. Therefore, this rule does not chill employees' Section 7 rights. Since the employer cannot perform its fundamental business function—loading and

unloading cargo—if employees strike or walk out, it has a legitimate business justification for this rule. Further, by definition, prohibiting illegal activity, such as participating in an illegal strike, is a legitimate work rule.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the arguments set forth above, Respondent proposes the following Findings of Fact and Conclusions of Law.

A. FINDINGS OF FACT

1. Adoption of the Handbook

Nicholson has operated its cargo handling business at its two terminals with nearly all of its non-supervisory workforce being represented by the IAM or its predecessor. No evidence was presented on the record of any organizing activity regarding the four non-union, non-supervisory employees.

Nicholson settled a successor collective bargaining agreement with the IAM in January 2017 (R. Ex. 1). Those negotiations included agreement that the handbook, revised in September 2016, was incorporated by reference into the collective bargaining agreement (Jt. Ex. 1, R. Ex. 1, p. 31). Any discipline issued for an alleged violation of a specific handbook rule would be issued under a "just cause" standard (R. Ex. 1, p. 21-22). Any such discipline could be challenged under the collective bargaining agreement's grievance and arbitration procedure (R. Ex. 1, p. 30-31).

2. Application of the Handbook

No employee has been disciplined or lost pay for an unpaid suspension for any violation of the handbook (Tr. 39-40, 50). No employee has requested an interpretation from the Company regarding the application of a specific rule (Tr. 20, 45-46, 51, 54). Further, during negotiations, neither the Union staff representative nor any member of the Union bargaining committee raised any questions or concerns about the handbook (Tr. 62-63).

3. The Challenged Handbook Rules Are Not Likely to Chill Employees' Section 7 Rights

The record establishes that none of the challenged rules in the handbook would significantly affect the Section 7 rights of either the IAM-represented or the non-union, non-supervisory employees. The handbook has been in place for several years and no one has questioned those rules or been disciplined under them (Tr. 59).

IAM-represented employees have a right under the collective bargaining agreement to work for the Union. None of the IAM-represented employees have access to Nicholson's website, computers or email addresses. IAM-represented employees are prohibited under their collective bargaining agreement from participating in either a legal or illegal strike, slowdown or walkout.

Employees who work both inside and outside have access to the Company's and its customers' trade secrets, but have no legitimate reason to disclose those trade secrets to a competitor of Nicholson or its customers' competitors by video recording cargo or the names of customers on that cargo. The prohibition on video recording does not bar reasonable alternative measures for employees to raise safety concerns.

4. The Challenged Handbook Rules Were Adopted for Legitimate Business Reasons

Each of the challenged rules were adopted for legitimate operational reasons by the Company and no evidence to the contrary was presented.

The prohibition on using cell phones and cameras was implemented to encourage worker productivity and safety. Similarly, the limitation on using computers only for business-related information was intended to encourage worker productivity. None of the outside employees have access to Company-issued email addresses or computers. The prohibition on participating in illegal strikes is consistent with the language of the collective bargaining agreement.

The moonlighting policy was designed to ensure that employees, if they work a second job, are not fatigued while working their regular position at Nicholson and that they would not be working for a competitor.

B. CONCLUSIONS OF LAW

General Counsel has failed to establish that any of the challenged rules in Nicholson's handbook trample employees' Section 7 rights. Each of these rules were established for legitimate business reasons. These rules do not violate the Act, therefore, Nicholson did not violate Section 8(a)(1) of the Act.

General Counsel has also failed to establish that any employee has suffered any monetary loss or discipline as a result of the handbook rules. Therefore, no monetary remedy is warranted.

REMEDY

Based on the preceding reasons and authority, Respondent requests that the relief requested by the General Counsel be denied in its entirety. Respondent also requests a finding that it did not violate the Act in any respect.

Respectfully submitted,

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Dated: January 31, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2018, I electronically filed the foregoing Post-Hearing Brief of Nicholson Terminal and Dock with the National Labor Relations Board and electronically served a copy of same on Renee D. McKinney, Board Attorney, at the email address listed below:

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I further certify that the Charging Party was served by U.S. first class mail on January 31, 2018 as follows:

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